Supreme Court, U. S.
FILED
DEC 7 1998
CLERK

No. 98-733

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JOHNNY POWELL and HUGH POWELL,

Petitioners,

vs.

ALABAMA POWER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN F. CASEY
Counsel of Record
R. BRUCE BARZE, JR.
SPENCER M. TAYLOR
BALCH & BINGHAM LLP
Attorneys for Respondent
1710 Sixth Avenue North
Birmingham, Alabama 35203
(205) 251-8100

150056

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the trial court properly found that Alabama Power Company's protection of its flood easement, a private property right, does not constitute the federal action necessary to support the Petitioners' Counterclaim.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding.

The Southern Company is the parent company of respondent Alabama Power Company. Southern Electric Generating Company is a nonwholly owned subsidiary of respondent Alabama Power Company.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding and Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of the Case	1
A. The petition omits pertinent facts.	1
B. The petition mischaracterizes the issue in this case.	4
Reasons for Denying the Writ	5
I. Review Is Not Warranted Because Apco's Protection Of Its Flood Easement, A Private Property Right, Does Not Constitute The Federal Action Necessary To Support The Petitioner's Constitutional And 42 U.S.C. § 1983 Claims.	5
A. APCo is merely enforcing a private property right.	6
B. The Petitioners cannot demonstrate federal action under any test.	8

Contents

Page

1. APCo is not performing an activity traditionally exclusively reserved to the federal government. 10

2. There is no nexus or joint participation between APCo's protection of its flood easement and the federal government. 14

3. Petitioners offer no authority to support their position. 18

Conclusion 21

TABLE OF CITED AUTHORITIES

Page

Cases:

Alabama Power Co. v. Smith, 575 So. 2d 1084 (Ala. 1991) 8

Appling County v. Municipal Electric Authority of Georgia, 621 F.2d 1301 (5th Cir. 1980) 8, 17

Blum v. Yaretsky, 457 U.S. 991 (1982) 7, 11

Brown v. Alabama Power Company, 156 So. 2d 153 (Ala. 1963) 6

Carlin Communication v. Southern Bell, 802 F.2d 1352 (11th Cir. 1986) 6, 7, 16, 17

Cobb v. Georgia Power Company, 757 F.2d 1248 (11th Cir. 1985) 17

Cook v. Advertiser Company, Inc., 323 F. Supp. 1212 (M.D. Ala. 1971), *aff'd*, 458 F.2d 1119 (5th Cir. 1972) 17

Feldman v. Jackson Memorial Hospital, 509 F. Supp. 815 (S.D. Fla. 1981) 14

Green and B. R. Navigation Co. v. Chesapeake, O and S.W.R. Co., 10 S.W. 6 (Ky. Ct. App. 1888) 18

Groman v. Township of Manalapan, 47 F.3d 628 (3rd Cir. 1995) 13, 14

Cited Authorities

Page

Hansen v. Salt Lake County, 794 P.2d 838 (Utah 1990) 18, 19

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) 8, 9, 10, 11, 12, 14, 15, 16, 18, 20

Kearson v. Southern Bell Telephone & Telegraph Co., 763 F.2d 405 (11th Cir. 1985), *cert. denied*, 474 U.S. 1065 (1986) 8, 17, 18

Kimbrough v. Nat'l Railroad Passenger Corp., 549 F. Supp. 169 (M.D. Ala. 1982) 8, 17

Mark v. Borough of Hatboro, 856 F. Supp. 966 (E.D. Pa. 1994) 13

Moore v. Liberty Nat. Life Ins. Co., 581 So. 2d 833 (Ala. 1991) 3

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 16

Morast v. Lance, 807 F.2d 926 (11th Cir. 1987) .. 8, 9, 14, 15

Newton v. Southeast Alabama Gas District, 708 F. Supp. 1254 (M.D. Ala. 1989) 19, 20

Pennsylvania Water & Power Co. v. Federal Power Commission, 123 F.2d 155 (D.C. Cir. 1941) 18, 19, 20

Cited Authorities

Page

Shell Oil Co. v. Board of Commissioners of Pontchartrain Levee District, 336 So. 2d 248 (La. Ct. App. 1976) 18, 19

State of Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508 (1941) 19, 20

System Dynamics International, Inc. v. Boykin, 683 So. 2d 419 (Ala. 1996) 7

United Auto Workers v. Gaston Festivals, Inc., 43 F.3d 902 (4th Cir. 1995) 12, 13, 20

United States v. Grand River Dam Authority, 363 U.S. 229 (1960) 19, 20

United States of America v. Twin City Power Co., 350 U.S. 222 (1956) 19

Statutes:

42 U.S.C. § 1983 ..... 5, 18

PA. STAT. ANN., Tit. 66, § 1171 (West 1959) 10, 11

United States Constitution:

Fifth Amendment 1, 2, 5

First Amendment 17

Fourteenth Amendment 8, 11

Cited Authorities

Page

Rules:

Alabama Rule of Civil Procedure 12(b)(6) 3

Alabama Rule of Civil Procedure 56(c) 3

STATEMENT OF THE CASE

Respondent Alabama Power Company (hereinafter "APCo") agrees with the procedural history of this case set forth in the petition filed by Hugh and Johnny Powell (hereinafter "Petitioners"). However, the Petitioners' statement of the case omits pertinent facts that were before the trial court and mischaracterizes the issue presented. APCo will supplement and correct the Petitioner's statement below, as well as address the question presented by Petitioners: that is, their contention that APCo is a federal actor for the purpose of a Fifth Amendment discrimination claim.

As detailed below, there is no cause for this Court's review of this fact bound contention, which now has been rejected by the trial court and by the Supreme Court of Alabama on two, separate occasions. Substituting hyperbole about APCo "discriminat[ing] with impunity on the grounds of race, religion, friendship, or for other equally trivial reason" (Pet. 6) for an accurate description of the facts and issue at hand, the Petitioners have distorted the question presented in this case.

A. The petition omits pertinent facts.

In furtherance of their assertion that this case concerns only flood control by a federal actor, Petitioners omit facts about the true nature of this trespass case, filed by one landowner, APCo, to prevent its neighboring landowners, the Petitioners, from placing dirt and fill materials on APCo's property.

On August 19, 1965 APCo acquired a fee simple interest in certain real property (214.3 acres, more or less) located in St. Clair County, Alabama, which presently comprises a portion of the land under the Logan Martin Dam Reservoir (the "Reservoir"). App. 3d, 2h.[1] APCo also acquired an easement

1. Citations to "App. __" refer to the appendix submitted by the Petitioners.

granting the right to flood 40.5 additional acres, more or less, of property belonging to the Petitioners, lying between the elevation of 465 feet above mean sea level and the elevation of 473.5 feet above mean sea level (the "flood easement"). App. 2h. The Petitioners' predecessors in interest received $31,328 as compensation for the 214.3 acres and the flood easement. App. 2h.

APCo filed this common law trespass action on April 20, 1995 in the Circuit Court of St. Clair County, Alabama, seeking to enjoin the Petitioners from placing dirt and fill materials between the Petitioners' Property and an island within the boundaries of the Reservoir. R. 11-20. By placing these materials in the Reservoir (where APCo owns the land in fee simple) and in the flood easement, the Petitioners have constructed a dirt road from their property to the island, and APCo seeks an order requiring the Petitioners to cease this activity and to remove all of the fill materials. R. 11-20. The trial court issued a preliminary injunction by consent of the parties prohibiting the Petitioners from placing further fill materials in the flood easement during the pendency of these proceedings. R. 32-33.

On November 18, 1996 the Petitioners filed a Counterclaim alleging that APCo, while acting under color of law, violated their Fifth Amendment due process and equal protection rights by arbitrarily and capriciously enforcing its rights related to the flood easement. R. 52-53. The Petitioners' allegations purportedly were based on the fact that APCo initiated this lawsuit against them, but had not pursued the same remedies against other similarly-situated property owners.[2] R. 52-53, 129-

2. It is noteworthy that the Petitioners have failed to cite ***any*** specific example of discrimination demonstrating arbitrary or capricious application of APCo's easement rights, nor have they identified in the (Cont'd)

31. The Petitioners amended their Counterclaim on March 31, 1997, asserting substantially the same challenges. App. 1e.

On December 18, 1996 APCo moved to dismiss the Petitioners' Counterclaim on the ground that it failed to demonstrate the necessary element of federal action by APCo. R. 56-63. After extensive briefing by the parties and submission of evidence, the trial court dismissed Petitioners' Counterclaim on May 13, 1997, finding that APCo's protection of its flood easement did not amount to federal action.[3] App. 1a-3a. The trial court held,

> Defendants have offered no authority to support [a finding of federal action]; in fact, the authority submitted to this Court by all parties establishes that APCo's activities are private, as opposed to actions of the FERC or federal government.

App. 2a.[4]

(Cont'd)
record any "similarly situated" property owners who have been treated differently. These unsupported allegations merely serve to highlight the Counterclaim's overall lack of merit.

3. APCo's claims in this lawsuit, which was filed on April 20, 1995, have been stayed pending the outcome of this appeal.

4. Because the trial court considered matters outside the pleadings, APCo's motion to dismiss was converted to a motion for summary judgment, in accordance with Alabama Rule of Civil Procedure 56(c). *Moore v. Liberty Nat. Life Ins. Co.*, 581 So. 2d 833, 834 (Ala. 1991). In addition, the trial court's order states that the Counterclaim is "due to be dismissed, with prejudice, pursuant to Rules 12(b)(6) ***and 56 of the Alabama Rules of Civil Procedure***. . . ." App. 2a (emphasis added). The order, thus, flatly contradicts Petitioners' premise that the appropriate standard of review is a Rule 12(b)(6) "motion to dismiss" standard. Pet. 8.

On May 30, 1997 the Petitioners filed a notice of appeal to the Supreme Court of Alabama. R. 198-203. The Supreme Court of Alabama affirmed the trial court's decision without opinion on April 17, 1998, and it denied the Petitioners' Application for Rehearing on June 19, 1998. App. 1b and 1c.

B. The petition mischaracterizes the issue in this case.

Contrary to Petitioners' assertions, the issue before the trial court was whether APCo became a federal actor by virtue of (1) the protection of its flood easement, and (2) its filing of a civil trespass action to require the Petitioners to remove dirt and fill materials placed by them in the flood easement and Reservoir and to prohibit the future placement of such fill materials. Petitioners mischaracterize this issue as one of "flood control," and assert that flood control is an activity that is traditionally and exclusively reserved to the federal government. This assertion not only is incorrect, but it mischaracterizes Petitioners' Counterclaim and the trial court's order of dismissal — an order which was affirmed by the Supreme Court of Alabama.

APCo maintains a flood easement, as required by its Federal Energy Regulatory Commission (hereinafter "FERC") license, in order to operate the Reservoir and generate electric power, and this operation admittedly involves some elements of shoreline regulation and flood control. R. 141-42. However, the Petitioners' Counterclaim did ***not*** challenge APCo's operation of the Reservoir or APCo's right to flood portions of the Petitioners' property. Nor did the Counterclaim complain about placement by APCo of structures on their property or the denial of a shoreline construction permit. The only activity challenged by the Counterclaim is APCo's decision, as a private land owner, to enforce its property rights. However, APCo's vigilance with respect to its property rights does not equate to action by the federal government.

REASONS FOR DENYING THE WRIT

I.

REVIEW IS NOT WARRANTED BECAUSE APCO'S PROTECTION OF ITS FLOOD EASEMENT, A PRIVATE PROPERTY RIGHT, DOES NOT CONSTITUTE THE FEDERAL ACTION NECESSARY TO SUPPORT THE PETITIONER'S CONSTITUTIONAL AND 42 U.S.C. § 1983 CLAIMS.

The petition's fact bound claim that the courts below committed error in determining that Petitioners' Counterclaim was due to be dismissed does not warrant review by this Court. Review by this Court is not appropriate when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. In any event, however, the decision below was a plainly correct application of settled law.

The Petitioners contend that this case is worthy of United States Supreme Court review because, according to the petition, the trial court and the Supreme Court of Alabama (1) made an erroneous factual finding — that APCo is a private actor; and (2) misinterpreted the applicability of the Fifth Amendment to APCo, which allegedly has discriminated against Petitioners "in the regulation of easements acquired pursuant to a federal license to control flooding on navigable waters." Pet. 6. Further, Petitioners state that "APCo asserts that because it is a private entity it may discriminate with impunity on the grounds of race, religion, friendship, or for other equally trivial reason" and that

> [t]his argument was adopted by the trial court and on appeal, by the Supreme Court of Alabama ***based on an erroneous interpretation*** of this Court's

> ruling in *Jackson v. Metropolitan Edison*, [419 U.S. 345 (1974)].

Pet. 6 (emphasis added). Because the petition is based solely on Petitioners' assertions of erroneous factual findings and misapplications of settled law, the petition is due to be denied. Moreover, Petitioners' argument misstates APCo's position set forth in its motion to dismiss the Counterclaim, and it misrepresents the trial court's order dismissing their claims.

A. APCo is merely enforcing a private property right.

Contrary to the Petitioners' assertions, APCo's position, with which the trial court and the Supreme Court of Alabama agreed, was that APCo was ***not*** acting as the federal government when it filed a civil trespass action to protect its property rights; rather, it simply was exercising the right, enjoyed by any private citizen, to bring a cause of action to enforce an easement. *See, e.g., Brown v. Alabama Power Company*, 156 So. 2d 153, 155 (Ala. 1963) ("The owner of the servient estate must abstain from acts interfering with the proper enjoyment of the easement by the owner of the dominant estate."). The Petitioners' characterization of the challenged activity as flood control rather than the protection of APCo's property right is entitled to no consideration under law.

Decisions of this Court "have made it clear that in order to establish state action the plaintiff must show that the state is responsible for the ***specific conduct*** of which he complains." *See Carlin Communication v. Southern Bell*, 802 F.2d 1352, 1357 (11th Cir. 1986) (emphasis added).

> Faithful adherence to the state action requirement of the Fourteenth Amendment requires careful

> attention to the gravamen of the [Petitioners'] complaint.

Id. (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982)). The gravamen of the Petitioners' Counterclaim clearly is ***not*** that APCo provides more flood protection to similarly-situated property owners than it does to the Petitioners, or that it has discriminated against the Petitioners on the basis of "race, religion, friendship, or for other equally trivial reason." Rather, the only basis for the Petitioners' Counterclaim appears to be that APCo, by the mere act of attempting to enforce its private property rights, was acting as the federal government. The trial court, and Alabama's highest court, found correctly that the Petitioners offered no authority to support this position:

> It is the opinion of this Court that APCo's operation of its reservoir for the generation of power, which necessarily includes elements of shoreline regulation and flood control, does not amount to state action, necessary to support [Petitioners'] Counterclaim and Amended Counterclaim against APCo. Because [Petitioners] fail to show that APCo's operation of its reservoir is state action under any test, [Petitioners'] Counterclaim and Amended Counterclaim are due to be dismissed.

App. 3a. The trial court determined, after reviewing evidence and the parties' legal arguments, that "the authority submitted . . . by all parties establishes that APCo's activities are private, as opposed to actions of the FERC or the federal government." The trial court, following applicable precedent, determined that there was no genuine issue as to any material fact and that APCo was entitled to judgment as a matter of law. *See System Dynamics International, Inc. v. Boykin*, 683 So. 2d 419, 420 (Ala. 1996). All precedent from this Court and state and federal

courts is clear: dismissal of constitutional claims against a private power company is proper when the complainant fails to show that the activities of the utility are attributable to the government itself. *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (affirming dismissal of plaintiff's Fourteenth Amendment complaint against a privately-owned power company because there was no state action); *Kearson v. Southern Bell Telephone & Telegraph Co.*, 763 F.2d 405 (11th Cir. 1985), *cert. denied*, 474 U.S. 1065 (1986) (affirming dismissal of plaintiff's complaint against utility for lack of state action); *Appling County v. Municipal Electric Authority of Georgia*, 621 F.2d 1301 (5th Cir. 1980) (affirming dismissal of plaintiff's complaint against utility for lack of state action); *Kimbrough v. Nat'l Railroad Passenger Corp.*, 549 F. Supp. 169 (M.D. Ala. 1982) (granting Amtrak's motion to dismiss for lack of state action); *Alabama Power Co. v. Smith*, 575 So. 2d 1084 (Ala. 1991) (directing verdict for APCo on the basis that there was no state action when APCo discontinued electrical service in accordance with public service commission authorization when power meter measurements were questionable). Because the Petitioners failed to show that APCo, a private actor, was acting as the federal government in seeking to protect its flood easement, the courts below properly applied existing law and dismissed the Petitioners' Counterclaim.

B. The Petitioners cannot demonstrate federal action under any test.

The trial court correctly applied three tests in evaluating whether federal action was present: (1) the symbiotic relationship test; (2) the public function test; and (3) the nexus test. *Morast v. Lance*, 807 F.2d 926, 931 (11th Cir. 1987) (holding that national bank did not act under color of federal law in terminating employee). Under the symbiotic relationship test,

> the court must consider whether the government "has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity."[5]

Id. Under the public function test, government action is present where the government has delegated to a private party a power "traditionally exclusively reserved" to the state or federal government. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). Finally, for government action to exist under the nexus test, there must be a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State." *Jackson*, 419 U.S. at 351 (holding there was an insufficient relationship between the state and the utility to conclude that the utility acted for the state). Under any test, the

> State normally can be held responsible for private decisions ***only*** when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.

Morast, 807 F.2d at 931 (emphasis added). In granting APCo's Motion to Dismiss, the trial court held that the Petitioners were unable to establish federal action under any test. App. 3a.

---

5. The Petitioners have never argued that the symbiotic relationship test has been met.

1. *APCo is not performing an activity traditionally exclusively reserved to the federal government.*

Failing to cite a single example, the Petitioners baldly assert that APCo has arbitrarily and capriciously applied rules and regulations relating to the easement. The "rules and regulations" to which the Petitioners refer apparently relate to APCo's treatment of similarly-situated property owners, yet the record is devoid of ***any*** evidence that other property owners are placing dredge and fill materials in APCo's easement or the Reservoir. Because this case concerns enforcement of private property rights, whether flood control is an activity traditionally reserved exclusively to the federal government is irrelevant — flood control simply is not the issue in this case. However, under any characterization, all precedent clearly establishes that Petitioners have failed to demonstrate that APCo has undertaken ***any*** activity traditionally reserved to the federal government.

In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), this Court dismissed a plaintiff's complaint against a defendant utility, holding that the utility's termination of her electric service did not constitute state action. *Jackson* held that the state action doctrine did not apply to a private power company which performed a "public function" and whose activities were "affected with the public interest." *Id.* at 353-54. The plaintiff in *Jackson* alleged that the utility's termination of her power service constituted state action, because the company was a heavily-regulated monopoly operating under state law. *Id.* at 350-52. She presented evidence that the State of Pennsylvania issued a certificate of public convenience to the heavily-regulated private power company, which subjected the defendant company to extensive regulation as a condition to holding the certificate. *Id.* at 346. Among these requirements, the Pennsylvania Code required electric service to be provided on a reasonably continuous basis. *Id.* at 352 (citing PA. STAT.

ANN., Tit. 66, § 1171 (West 1959)). She argued that because the utility provided a public service subject to this state requirement, the utility was a state actor for purposes of her Fourteenth Amendment challenge. *Id.*

This Court, however, held that the "supplying of utility service is not traditionally the exclusive prerogative of the State," and consequently, affirmed dismissal of the plaintiff's Fourteenth Amendment claims. *Jackson*, 419 U.S. at 353. While the Pennsylvania statute imposed an obligation on regulated utilities, it imposed no such obligation on the State. *Id.* In the instant case, the challenged activity is APCo's enforcement of its easement rights and an attempt to prohibit the Petitioners from disregarding APCo's property rights. Such action certainly is not an activity that is traditionally the exclusive prerogative of the federal government. Indeed, landowners for centuries have initiated such lawsuits to avoid losing their property rights by prescription. Moreover, even under the Petitioners' extraordinarily broad interpretation[6] of the challenged activity as "flood control," there is no federal action. APCo, a private actor, acquired this flood easement for the purpose of generating and supplying electricity. Taking the Petitioners' theory and interpretation of *Jackson* to its logical conclusion, the act of ***supplying*** power is not a traditionally exclusive activity of the government,[7] yet creating a reservoir to ***generate*** power would be a traditionally exclusive federal activity. Such an interpretation of *Jackson* is not only inconsistent, it makes no sense.

Perhaps even more important to the issue presented here, the Court in *Jackson* refused to expand the "traditionally

---

6. Such a broad interpretation is not permitted under *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982), which mandates "careful attention" to the gravamen of the Petitioners' Counterclaim.

7. *Jackson*, 419 U.S. at 353.

exclusively reserved activities" doctrine into a broad principle transforming all businesses affected with the public interest into government actors for all their actions. *Id.* The Court criticized such a test:

> In several of the decisions of this court wherein the expressions "affected with the public interest" and "clothed with a public use," have been brought forward as the criteria . . . it has been admitted that they are not susceptible of definition and form an unsatisfactory test.

Id. at 353 (citation omitted). Even if APCo serves the public interest as a by-product of attempting to enforce its flood easement, this is insufficient to treat APCo as the federal government.

Cases discussing the state action requirement under Section 1983 claims further demonstrate the narrow application of the test and highlight the Petitioners' failure to give effect to its "exclusively reserved to the state" component. For instance, in *United Auto Workers v. Gaston Festivals, Inc.*, 43 F.3d 902 (4th Cir. 1995), the court stated:

> The functions considered to fall traditionally within the exclusive prerogative of the state comprise a very narrow category, subject to "carefully confined bounds." The Supreme Court has identified as functions "traditionally exclusively reserved to the State," only the administration of elections, the operation of a company town, eminent domain,[8] peremptory challenges in jury selection,

8. The Petitioners attempt to hang their hat on this "eminent domain" language from *Jackson*. Clearly, enforcement of an easement is distinguishable from the exercise of eminent domain. This case and

(Cont'd)

and, in at least limited circumstances, the operation of a municipal park.

> The narrowness of this category is illustrated further by the functions that the Court has held do *not* fall traditionally within the exclusive prerogative of the State. These include the ***provision of electricity and other utilities***, the operation of nursing homes, and the coordination and governance of college and amateur athletics. The Court has held that schooling for maladjusted children does not qualify as a traditional and exclusive state function. . . . It has also noted that the provision of education does not render a private school's administrators state actors, even though "[i]t is difficult to imagine a regulated activity more essential or more "clothed with the public interest" than the maintenance of schools."
>
> Together, these cases confirm that ***only those undertakings that are uniquely sovereign in character*** qualify as traditional and exclusive state functions. As the Court has observed, ***[w]hile many functions have been traditionally performed by governments, very few have been "exclusively reserved to the State."***[9]

Id. at 907 (citations omitted) (emphasis in bold and italics added). The trial court, too, noted that the fact that APCo's

---

(Cont'd)

Petitioners' Counterclaim do not involve an attempt by APCo to acquire property by eminent domain, but instead simply concern APCo's attempt to prevent Petitioners from placing materials within its flood easement and the Reservoir.

9. *See also Mark v. Borough of Hatboro*, 856 F. Supp. 966 (E.D. Pa. 1994) (volunteer Fire Department was not state actor); *Groman v.*

(Cont'd)

operation of the Reservoir involves some elements of flood control and shoreline regulation is insufficient to establish federal action. *See, e.g., Feldman v. Jackson Memorial Hospital*, 509 F. Supp. 815 (S.D. Fla. 1981) (stating that the state must be involved in more than some activity of the offending institution; it must have been involved ***in the activity that caused the injury*** to the plaintiff).

2. *There is no nexus or joint participation between APCo's protection of its flood easement and the federal government.*

The Alabama courts found that the Petitioners similarly failed to show federal action under either the nexus or the symbiotic relationship tests. As stated above, for government action to exist under the nexus test, there must be a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state." *Jackson*, 419 U.S. at 351. Similarly, the symbiotic relationship test requires the federal government to "so far insinuate[ ] itself into a position of interdependence with [APCo] that it must be recognized as a joint participant" in APCo's protection of its flood easement. *Morast v. Lance*, 807 F.2d at 931.

In *Jackson*, the Court concluded that the State of Pennsylvania was not sufficiently connected with the utility's termination of electric service so as to make its conduct attributable to the State. *Id.* The Court affirmed dismissal based on an insufficient nexus:

(Cont'd)
Township of Manalapan, 47 F.3d 628 (3rd Cir. 1995) (public funding and service to public were insufficient to show volunteer first aid squad was performing exclusive government function which would support section 1983 liability).

> All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law. ***Under our decision this is not sufficient to connect the State of Pennsylvania with respondent's action so as to make the latter's conduct attributable to the State for purposes of the Fourteenth Amendment.***

Id. at 358 (emphasis added). The Court further stated:

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so.

Id. at 350. Thus, neither the company's monopoly status nor the state certification authorizing the company to distribute electricity equated to state action. *Id.* at 351-52. Nor was the fact that a Pennsylvania statute required electric service to be provided on a reasonably continuous basis a sufficient nexus between the federal government and the termination of the plaintiff's electric service. *Id.*

Here, there similarly is ***no*** nexus between the federal government and the challenged activity. APCo's license authorizing operation of the reservoir for the generation of power does not provide a sufficient nexus between the federal government and APCo's attempted protection of a private

property right. The "mere licensing of a private entity does not constitute state action." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). Petitioners attempt to distinguish *Moose Lodge* on the grounds that "the purpose of the APCo license is not to regulate a certain activity," but instead to delegate to APCo flood control activities which Petitioners allege is a duty "traditionally reserved to the federal government." Pet. 24. The cases, however, are indistinguishable, and Petitioners' argument is flawed. First, both licenses ***are*** regulatory; the liquor license in *Moose Lodge* was issued by the State to permit and regulate the sale of liquor just as the license here was issued to permit and regulate the generation of power. Second, Petitioners' argument that the license delegates to APCo the duty of flood control is simply a reversion back to their "traditionally exclusive governmental function" argument, and it suffers from the same infirmities highlighted above. Finally, and most important, Petitioners' challenge is not related to activity performed under or pursuant to APCo's license to generate power; rather, their Counterclaim concerns only the enforcement of APCo's property rights.

Jackson likewise found that the symbiotic relationship test was not met. *Jackson*, 419 U.S. at 357-58. The Court found that because the utility was a privately-owned power company that alone was responsible for supplying power to its customers, there was no joint participation and hence no state action. *Id.* at 358. As in *Jackson*, APCo alone is responsible for enforcing its property rights and generating electricity. *See also Carlin*, 802 F.2d at 1357 (stating the "mere approval of, or acquiescence in, the initiatives of a private party is not sufficient to establish state action").

Cases decided by the United States Court of Appeals for the Eleventh Circuit have held that operations of public utilities and heavily-regulated private businesses are insufficiently

connected to the state and cannot support a constitutional claim.[10] In *Carlin*, the court held that a privately-owned telephone company's restrictions on message content in its pre-recorded "dial-it" message service was not state action. The telephone company amended its subscriber tariff with the Florida Public Service Commission ("FPSC") to prohibit sexually explicit messages. *Id.* at 1354. The plaintiff alleged a violation of its First Amendment rights, asserting that the telephone company's restrictions constituted state action because (1) the FPSC scheduled the tariff for study and public hearing, and issued an order strongly approving the tariff language; (2) the FPSC pressured the company to alter the tariff's language; (3) the FPSC officers at the hearing stated concerns over the content control of the "dial it" program; and (4) the FPSC delegated the function of public censorship to the phone company. *Id.* at 1358-61. Affirming summary judgment for the utility, the court held that the only reasonable inference in the record was that Southern Bell denied the plaintiff access to the service in its private capacity. As in the instant case, the plaintiff in *Carlin* was unable to show that the government was responsible for the specific conduct complained of by the plaintiff. *Id.* at 1357. *See also Kearson v. Southern Bell Telephone & Telegraph Co.*, 763 F.2d 405 (11th Cir. 1985),

---

10. *See, e.g., Carlin Communication v. Southern Bell Telephone and Telegraph Co.*, 802 F.2d 1352, 1357 (11th Cir. 1986) (affirming summary judgment for utility); *Cobb v. Georgia Power Company*, 757 F.2d 1248 (11th Cir. 1985) (affirming summary judgment for utility); *Kearson v. Southern Bell Telephone & Telegraph Co.*, 763 F.2d 405 (11th Cir. 1985), *cert. denied*, 474 U.S. 1065 (1986) (affirming dismissal of plaintiff's complaint against utility); *Appling County v. Municipal Electric Authority of Georgia*, 621 F.2d 1301 (5th Cir. 1980) (affirming dismissal of plaintiff's complaint against utility); *Kimbrough v. Nat'l Railroad Passenger Corp.*, 549 F. Supp. 169 (M.D. Ala. 1982) (granting Amtrak's motion to dismiss); *Cook v. Advertiser Company, Inc.*, 323 F. Supp. 1212 (M.D. Ala. 1971), *aff'd*, 458 F.2d 1119 (5th Cir. 1972) (granting newspaper company's motion to dismiss).

cert. denied, 474 U.S. 1065 (1986) (affirming dismissal of complaint on basis that privately owned telephone company's termination of service to customer for nonpayment of bills did not involve "state action" within 42 U.S.C. § 1983).

In short, consistent with *Jackson* and these cases, APCo was not acting as the federal government by seeking to enforce its private property rights, and cannot be treated as the federal government simply because it has a flood easement and is licensed to operate the Reservoir for the generation of power. Just as the utility in *Jackson* could terminate service without subjecting itself to a constitutional challenge, APCo may institute this trespass action against individuals who violate its property rights without subjecting itself to such claims.

3. *Petitioners offer no authority to support their position.*

Significantly, Petitioners offer no authority supporting a finding that APCo is acting as the federal government in this case. They have not cited a single case finding state or federal action under these facts. It is noteworthy that the trial court permitted Petitioners substantial opportunity to offer such authority — none was ever offered, and such fact was noted by the trial court. App. 2. For this reason alone, the dismissal of the Counterclaim is due to be affirmed.

The cases cited by the Petitioners in support of federal action all are offered for the proposition that flood control is traditionally an activity exclusively reserved to the federal government.[11] Unfortunately, this case and Petitioners'

---

11. Petitioners cite *Green and B. R. Navigation Co. v. Chesapeake, O and S.W.R. Co.*, 10 S.W. 6 (Ky. Ct. App. 1888); *Hansen v. Salt Lake City*, 794 P.2d 838 (Utah 1990); *Pennsylvania Water and Power Co. v. Federal Power Commission*, 123 F.2d 155 (D.C. Cir. 1941); *Shell Oil*

(Cont'd)

Counterclaim are not about flood control. Even if they concerned flood control, however, dismissal of Petitioners' Counterclaim was proper because none of the cases or statutes cited by Petitioners have anything to do with a finding of state or federal action with facts such as those presented in this case.

First, none of the cases cited by Petitioners are state action cases involving private defendants. For example, Petitioners cite *Hansen v. Salt Lake County*, 794 P.2d 838 (Utah 1990), as recognizing "flood control as state action" in connection with upholding a flood control statute. However, *Hansen* involved a challenge to a ***county government*** defending on the grounds of governmental immunity, and quite clearly did not involve a private entity. *Hansen* did not present, address, or even mention state action, but only interpreted a Utah flood control statute. Petitioners also cite *Pennsylvania Water & Power Co. v. Federal Power Commission*, 123 F.2d 155 (D.C. Cir. 1941), which did not address the issue of federal action. Instead, that court held only that Congress could require a utility company to apply for a license to operate and maintain a hydroelectric project. Likewise, *United States of America v. Twin City Power Co.*, 350 U.S. 222 (1956), addressed only whether a utility was entitled to compensation equal to the water-power value of land taken by the federal government. Similarly, *Shell Oil Co. v. Board of Commissioners of Pontchartrain Levee District*, 336 So. 2d 248 (La. Ct. App. 1976), involved a defendant levee district that was created by an act of the Lousisana Congress, and *Newton v. Southeast Alabama Gas District*, 708 F. Supp. 1254, 1257 (M.D. Ala. 1989), found it unnecessary to address

---

(Cont'd)

Co. v. Board of Commissioners of Lake Ponchartrain Levee District, 336 So. 2d 248 (La. Ct. App. 1976); *State of Oklahoma v. Guy F. Atkinson, Co.*, 313 U.S. 508 (1941); *United States of America v. Twin City Power Co.*, 350 U.S. 222 (1956); *United States v. Grand River Dam Authority*, 363 U.S. 229, 333 (1960), as well as several statutes, for this proposition.

whether the Gas District's activities constituted state action because the district was a public entity. *Id.* at 1257-58.

Second, the cases cited by the Petitioners hold merely that flood control is a power within the authority of Congress pursuant to the commerce clause of the United States Constitution. However, simply because Congress has the authority to regulate flood control does not mean that flood control is an activity "exclusively reserved" to the federal government. *See Jackson*, 419 U.S. at 354 n.9 ("The range of governmental activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual or entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions"); *United Auto Workers v. Gaston Festivals, Inc.*, 43 F.3d 902, 907 (4th Cir. 1995) ("[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State' "). For example, *State of Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941) and *United States v. Grand River Dam Authority* 363 U.S. 229 (1960), held only that Congress' creation of a dam and reservoir project was a lawful exercise of its commerce power. Similarly, the court in *Pennsylvania Water & Power Co. v. Federal Power Commission*, 123 F.2d 155 (D.C. Cir. 1941), simply held that Congress, pursuant to its commerce power, could require a utility to purchase a license to construct a hydroelectric project. While Petitioners have cited a flurry of cases, none of them supports their position.

Finally, Petitioners' Counterclaim fails due to its inability to distinguish *Jackson* from the facts of this case. On the whole, Petitioners have offered no authority supporting their claim that APCo is a federal actor for purposes of their Counterclaim. The Petition presents nothing which has not already been considered and addressed by the Alabama courts. Consequently, the Petition should be denied.

CONCLUSION

Under these circumstances, and in the absence of any conflict between the decision of the Alabama courts and any decision of this Court, the petition should be denied.

Respectfully submitted,

STEVEN F. CASEY
Counsel of Record
R. BRUCE BARZE, JR.
SPENCER M. TAYLOR
BALCH & BINGHAM LLP
Attorneys for Respondent
1710 Sixth Avenue North
Birmingham, Alabama 35203
(205) 251-8100